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In the Supreme Court of the United States

OCTOBER TERM, 1990

RAYMOND CLUTTER AND ANNA SIZEMORE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the warrant authorizing the police to search petitioners' house was valid.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-9a, is reported at 914 F.2d 775. The opinion of the district court, Pet. App. 10a-17a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1990. A petition for rehearing was denied on November 2, 1990. The petition for a writ of certiorari was filed on November 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners entered conditional guilty pleas in the United States District Court for the Eastern District of Kentucky to the charge of possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Each petitioner was sentenced to 24 months' imprisonment and three years' supervised release. The court of appeals affirmed.

1. Petitioners lived together in a house in Highland Heights, Kentucky, together with petitioner Anna Sizemore's children from her previous marriage—Chris (age 14), Jim (age 12), and Amy (age 10). Petitioners routinely left the children alone in the house from the time they left for work in the evening (around 7:00 or 8:00 p.m.) until they returned the next morning (between 4:00 and 6:00 a.m.). Pet. App. 2a.

In October 1987, Chris and Jim reported to their father, Frank Sizemore, that petitioners stored a "tremendous" amount of marijuana in the house. Chris later gave Frank Sizemore a plastic bag of marijuana taken from petitioners' bedroom. Frank Sizemore turned the sample over to Hal Spaw of the Northern Kentucky Narcotics Unit and told him of the boys' discovery. Pet. App. 2a.

Officer Spaw asked Frank Sizemore to sign an affidavit for a search warrant, based upon the information given to him by his sons, but he declined out of fear for his own safety and that of his sons.[1] Pet. App. 2a, 11a.

To maintain confidentiality and still develop for a judge the information necessary to obtain a search warrant, Officer Spaw told Mr. Sizemore that someone, perhaps an informant, would need to get inside petitioners' residence to

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[1] Sizemore said that petitioners had threatened to kill him on several occasions. He was also afraid that the children would be injured physically if petitioners found out that the children had exposed their stash of marijuana. Pet. App. 2a, 11a.

confirm the information given by the boys. Mr. Sizemore suggested that the boys could let Officer Spaw into the house, and he telephoned them to arrange for the visit. That evening, without entering the house, Mr. Sizemore picked up his daughter from petitioners' house.[2] Later, Officer Spaw drove to petitioners' house, knocked on the door, showed the boys his badge, and identified himself as the policeman they were expecting. The boys admitted him through the kitchen door. Officer Spaw immediately smelled marijuana. The boys led Officer Spaw into petitioners' bedroom and pointed out a dresser drawer as the location of marijuana. Officer Spaw opened the drawer and saw sandwich-sized plastic bags containing marijuana. The boys then indicated there was more behind the dresser and, without moving any furniture, Officer Spaw was able to see "two big garbage bags full of marijuana." He left without removing anything from the house. Pet. App. 2a-3a, 12a.

Officer Spaw prepared an affidavit to support an application for a search warrant for the signature of another police officer. To protect the boys from retaliation by petitioners, Officer Spaw attributed his observations inside petitioners' house to a confidential informant. The fact that the confidential informant was Officer Spaw and that entry into the home was obtained through the help of the Sizemore children was not mentioned in the affidavit. A search warrant was issued, and the police found 28.25 pounds of marijuana in petitioners' home. Pet. App. 3a.

2. After receiving a magistrate's recommendation, the district court denied petitioners' motion to suppress the

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[2] Mr. Sizemore was forbidden by a court order from entering the property because of his bitter divorce from Anna Sizemore, but he was allowed to pick up his children from the residence.

marijuana. Pet. App. 10a-17a.[3] The district court found it unnecessary to determine the validity of the boys' consent because the marijuana seized during the later search pursuant to a warrant was admissible under the good faith exception to the exclusionary rule. *Id.* at 14a-17a. The district court recognized that the affidavit in support of the warrant did not reveal that Officer Spaw was the confidential informant. But the court noted that Officer Spaw "had abundant probable cause to seek the warrant," *id.* at 16a, and that he "misstated the facts to the state judge only to protect the children, not to enhance the probable cause," *id.* at 17a. "The actual facts presented a stronger case for probable cause in the eyes of the court than did the facts stated in the affidavit." *Id.* at 16a. The court remarked that the "officer had to act in the field under field conditions," and concluded that he "acted in good faith under the circumstances." *Id.* at 16a-17a.

3. The court of appeals affirmed. Pet. App. 1a-9a. It saw no need to rely on the good faith exception to the exclusionary rule. It held simply that the boys had authority to consent to Officer Spaw's search and that petitioners had waived their challenge to the manner by which Officer Spaw

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[3] The magistrate recommended that the marijuana be suppressed because petitioners had not given the boys permission to consent to Officer Spaw's search; in the magistrate's view, the warrant rested on information illegally obtained. Pet. App. 26a.

The magistrate rejected petitioners' argument that the affidavit contained materially misleading information. Although the judge issuing the warrant "may have reasonably believed that the confidential informant and [Officer] Spaw were two separate persons, * * * that misconception was not crucial to establishing probable cause." Pet. App. 27a. "[T]he language employed in this affidavit was for the sole purpose of protecting the identity of the children" and the information respecting the informant's observations was "demonstrably accurate and did not mislead the issuing judge." *Id.* at 27a-28a.

had concealed the boys' role in the affidavit supporting the search warrant.

a. Relying on *United States* v. *Matlock*, 415 U.S. 164, 171 (1974), the court of appeals observed that consent to search may be furnished by the defendant or by a third party who has "common authority over or other sufficient relationship to the premises or effects sought to be inspected." Pet. App. 4a. Such authority rests on "mutual use of the property by persons generally having joint access or control for most purposes." *Ibid.* (quoting *Matlock*, 415 U.S. at 171 n.7). "Under the circumstances of this case, where children twelve and fourteen years of age routinely were left in exclusive control of the house, and [petitioners'] possession of large quantities of marijuana was so open and patently nonexclusive that its odor pervaded the house, the government satisfied its burden of demonstrating the initial warrantless search of the bedroom was by consent, since the boys enjoyed that degree of access and control over the house that afforded them the right to permit inspection of any room in the house, and [petitioners] assumed that risk." Pet. App. 5a.[4] The court observed that whether the boys "had the authority to consent to [Officer] Spaw's inspection of the bureau drawer is a closer question, but one [the court] need not address, since the large amount of marijuana validly seized in the garbage bags was sufficient to support issuance of the search warrant (and the convictions)." *Ibid.*

The court rejected petitioners' argument that the boys "could not consent to the search, since [Officer] Spaw knew that [petitioners] would not have permitted the boys to allow him to see the marijuana." Pet. App. 5a. "That argument

[4] Even if the boys lacked "joint access or control for most purposes, the facts were more than adequate to support a reasonable belief by [Officer] Spaw that the boys had authority to consent." Pet. App. 5a n.1 (citing *Illinois* v. *Rodriguez*, 110 S. Ct. 2793 (1990)).

confuses the idea of common authority to consent to a search, with actual authority given an agent by his principal, and could be used to invalidate nearly any consent to search given by a third party." *Id.* at 5a-6a. The court explained that "[k]nowledge that [petitioners], like any other violators of the law, would not have wanted to be turned in to law enforcement authorities, is insufficient to defeat the reality that the boys possessed common authority over the premises." *Id.* at 6a.[5]

b. The court of appeals also rejected petitioners' argument that the affidavit accompanying the application for the search warrant contained material factual omissions. Pet. App. 8a-9a. First, the court held that petitioners failed to preserve that contention because they did not file a timely objection to the magistrate's recommendation rejecting their contention. *Id.* at 8a. Second, the court determined that "the omission from the affidavit of a specific description of the method by which it was obtained, cannot be said to be a material omission." *Id.* at 8a-9a. "[W]hile the judge who issued the search warrant might have been misled into believing that Spaw and the confidential informant were two different persons, that misconception would not have been crucial to establishing probable cause." *Id.* at 9a. The court emphasized that no facts "relating to probable cause * * * are false" and "it cannot be said that [the officers] acted to deceive the judge as to the existence of probable cause." *Ibid.*

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[5] In the alternative, the court held that the seized marijuana was admissible as the fruit of a private search. See Pet. App. 6a-8a (citing *United States* v. *Jacobsen*, 466 U.S. 109 (1984); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Burdeau* v. *McDowell*, 256 U.S. 465 (1921)). "[Officer Spaw] learned nothing as the result of his own conduct that he had not already heard about as the result of the private search." Pet. App. 8a.

ARGUMENT

The affidavit in support of the warrant to search petitioners' house did not rest on illegally obtained information or contain omissions relevant to the state judge's determination of probable cause. The court of appeals' decision to uphold petitioners' convictions is therefore correct. It does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Contrary to petitioners' contention, Pet. 6-9, the Sizemore boys' consent to search petitioners' house was valid. In *United States* v. *Matlock*, 415 U.S. 164, 171 (1974), this Court held that a third party may consent to a search of a dwelling if he has "common authority over or other sufficient relationship to the premises." The Court explained that such consent rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at 171 n.7; see *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969). The admonition that "courts indulge every reasonable presumption against waiver," Pet. 6 (citing *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)), does not apply to the determination whether consent is valid. "[A] consent search is fundamentally different in nature from the waiver of a trial right." *Matlock*, 415 U.S. at 171. "*Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), has since made clear, of course, that it is not essential for the prosecution to show that the consenter knew of the right to refuse consent in order to establish that the consent was voluntary." *Matlock*, 415 U.S. at 167 n.2.

Since this Court's decision in *Matlock*, lower courts have consistently held that a child can consent to a search. See,

e.g., *Doyle* v. *State*, 633 P.2d 306, 307 (Alaska Ct. App. 1981) (upholding teenager's consent to police officer's entry into living room: "Notably, all the cases we have found which deal with the third party consent of a child uphold the child's consent; not one supports a general rule precluding a minor from giving valid consent."); *Saavedra* v. *State*, No. 88-561 (Fla. Dist. Ct. App. Nov. 8, 1990) (LEXIS, States library, Fla. file) (upholding 15-year-old's consent to police officer's entry into home to arrest father); *Atkins* v. *State*, 254 Ga. 641, 642, 331 S.E. 597, 598 (1985) (rejecting per se rule against consent by children); *People* v. *Swansey*, 62 Ill. App. 3d 1015, 1018, 379 N.E.2d 1279, 1281 (1978) (upholding 13-year-old's consent to search for body in crawl space in basement); *State* v. *Folkens*, 281 N.W.2d 1, 3-4 (Iowa 1979) (upholding 14-year-old girl's consent to search house); *State* v. *Scott*, 82 Or. App. 645, 649-650, 729 P.2d 585, 587-588 (1986) (rejecting per se rule against consent by children); *Commonwealth* v. *Maxwell*, 505 Pa. 152, 162-163, 477 A.2d 1309, 1315 (upholding 16-year-old's consent to police officer's entry into basement to examine trash bag in which child had previously found a body), cert. denied, 469 U.S. 971 (1984). See generally 2 W. LaFave, *Search and Seizure* § 8.4(c) (2d ed. 1987) (suggesting that children can give effective consent depending on the age of the child and the scope of the consent given).

The cases in which courts have not upheld children's consent, Pet. 6-7, reflect the failure to satisfy the requirements of a consent search in a particular case, not a division of authority over the rule applicable to consent given by minors. For example, in *People* v. *Jennings*, 142 Cal. App. 2d 160, 169, 298 P.2d 56, 62 (1956), the court underscored that the officer had not even asked the child for consent to search. In other cases cited by petitioners, the children did not exercise, as they did here, exclusive control of the house on a frequent basis. See *People* v. *Jacobs*, 43 Cal.

3d 472, 483, 233 Cal. Rptr. 323, 329, 729 P.2d 757, 764 (1987) ("We do not suggest that consent by a minor will be ineffective in all cases in which no adult occupants are present."); *Padron* v. *State*, 328 So.2d 216, 217-218 (applying *Matlock* rule "to the facts of the instant case"), cert. denied, 339 So. 2d 1172 (Fla. Dist. Ct. App. 1976); *Commonwealth* v. *Garcia*, 478 Pa. 406, 424, 387 A.2d 46, 55 (1978) ("In the instant case [the child] did not have dominion over the home equal to that of [the parent]."); *Hembree* v. *State*, 546 S.W.2d 235, 241 (Tenn. Crim. App. 1976) ("The rights of an 18 year old son to the use or occupation of the premises are not necessarily equal to the rights of use or occupation of his parents."). The balance of petitioners' authorities are even farther from the mark. Some of the older cases are of no precedential force, because they are simply inconsistent with this Court's later holding in *Matlock* that persons with common authority over a place may consent to its search. See *State* v. *Malcom*, 58 Del. 1, 203 A.2d 270 (Del. Super. Ct. 1964); *May* v. *State*, 199 So. 2d 635, 639 (Miss. 1967). And *Murphy* v. *State*, 355 So. 2d 1153, 1154 (Ala. Crim. App. 1978), in fact upheld the consent of a 12-year-old child.

In this case, the children—who initially had found the marijuana and brought it to their father's attention—were sufficiently mature to consent to the specific search in their home. As the court of appeals noted, Pet. App. 5a, the boys were 14 and 12, they were regularly left in exclusive control of the house, and petitioners stored the marijuana openly, so that its odor pervaded the house. Under those circumstances, the court of appeals was correct in holding that the government satisfied its burden of demonstrating that Officer Spaw's entry into the house and petitioner's bedroom was the product of a valid consent. The boys "enjoyed that degree of access and control over the house that afforded them the right to permit inspection of any room in the house

and [petitioners] assumed that risk." *Ibid.*[6] Indeed, the record contains no evidence that petitioners made any effort to prevent the children from having access to the marijuana when they were left alone in the premises, and petitioners never claimed that the children had no right to be in their bedroom. Gov't C.A. Br. 13.[7]

Petitioners complain that Officer Spaw knew that they would have denied the boys permission to admit him into the house. Pet. 8. As the court of appeals pointed out, however, "[t]hat argument confuses the idea of common authority to consent to a search, with actual authority given an agent by his principal, and could be used to invalidate nearly any consent to search given by a third party." Pet. App. 5a-6a. "Knowledge that [petitioners], like any other violators of the law, would not have wanted to be turned in to law enforcement authorities, is insufficient to defeat the reality that the boys possessed common authority over

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[6] Petitioners suggest that Mr. Sizemore instructed the children to admit the officer, Pet. 8-9, but nothing in the record indicates that the children were not free to refuse their father's request, see 6/21/88 Tr. 45, and the record in fact shows that the boys "invited" Officer Spaw into the house, *id.* at 35, 83-84.

[7] Petitioners insist that the boys did not have "equal access [to] and control" of the bedroom, and that "the search involved a dresser." Pet. 7. The former fact is irrelevant because *Matlock* requires only "joint access or control for most purposes"; equality of access or control is not required. See *Frazier* v. *Cupp*, 394 U.S. at 740 (rejecting relevance of defendant's claim that his cousin had access only to one compartment of duffel bag and so could not consent to search of the bag). The latter fact is likewise irrelevant in this case "since the large amount of marijuana validly seized in the garbage bags was sufficient to support issuance of the search warrant (and the convictions)" whether or not the children "also had the authority to consent to [Officer] Spaw's inspection of the bureau drawer." Pet. App. 5a.

the premises." *Id.* at 6a; see *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978).[8]

2. Officer Spaw's attempt to protect the boys by concealing their role in the search warrant affidavit did not relate to the facts establishing probable cause to search petitioners' house and therefore does not require suppression under *Franks* v. *Delaware*, 438 U.S. 154 (1978).

Even assuming that petitioners did not waive their *Franks* claim by failing to file a timely objection to the magistrate's rejection of that argument,[9] their *Franks* claim is without merit. It is true that the affidavit did not disclose that Officer Spaw was the confidential informant.[10] But the only effect

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[8] Even if the boys did not have actual authority to consent, Officer Spaw entered in the good faith belief that they did. The officer's reasonable belief means that the information obtained from his visit was not illegally obtained and should be used to invalidate the subsequently obtained warrant. Cf. *Illinois* v. *Rodriguez*, 110 S. Ct. 2793, 2798-2801 (1990).

[9] The Sixth Circuit properly held that petitioners waived their right to object to admission of the evidence on the *Franks* ground when they failed to file a timely objection to the magistrate's rejection of that discrete ground for suppression. Pet. App. 8a. That procedural default, standing alone, is sufficient to warrant denial of the petition, as the court's procedural ruling presents no issue on which the courts are divided or on which this Court's intervention is needed.

[10] The affidavit said:

> Affiant further states that on the date and at the time of 11/12/87 9:30 a.m. affiant[, Agent Berscheit,] received information from a confidential and reliable informant, Hereafter referred to as C.I., who stated to the affiant that the C.I. was in the above described residence within the last 48 hours of 11/12/87 and while in the residence did observe a very large quantity of marihuana. The marihuana is bagged in clear plastic baggies and is kept in the bedroom. The C.I. is familiar with marihuana and C.I. has seen marihuana on numerous occasions and is familiar with the packaging methods for street sales.

of that omission was to suggest that Officer Spaw and the confidential informant were two different persons. Concealment of the Officer Spaw's dual role did not misrepresent the basis or reliability of the observations described in the affidavit. As the magistrate found, "[t]he source of the information was correctly represented to be a confidential informant who had seen the marijuana within 48 hours of requesting the search warrant." Pet. App. 27a. Even if the judge who issued the search warrant "might have been misled into believing that [Officer Spaw] and the confidential informant were two different persons, that misconception would not have been crucial to establishing probable cause." *Id.* at 9a, 27a. Indeed, in the district court's estimation, "the actual probable cause was stronger than the misstated facts." *Id.* 17a.

Petitioners nonetheless argue that the concealment prevented the state judge from making "a rational decision concerning the existence of probable cause independent of any illegally obtained information." Pet. 16. As we note above, however, the observations described in the affidavit were obtained by means of a valid consent search. Thus, as the court of appeals correctly concluded, "because the information upon which the search warrant was predicated

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> Acting on the information received, affiant conducted the following independent investigation: The affiant checked with Hal Spaw Director of the Narcotics Unit and Hal Spaw stated that he has received complaints on Mr. Clutter dealing in marihuana on at least two occasions.
>
> Affiant believes his informant to be reliable and truthful because The C.I. has supplied to the affiant on at least three (3) occasions in the last four (4) months to the whereabouts of Controlled substances including marihuana and on each occasion controlled substances were seized.

Pet. App. 22a.

was legally obtained, the omission from the affidavit of a specific description of the method by which it was obtained, cannot be said to be a material omission." Pet. App. 8a-9a; see *Franks* v. *Delaware*, 438 U.S. at 171-172.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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